No. 91-860

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., APPELLANTS

v.

STATE OF MONTANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

REPLY BRIEF FOR APPELLANTS UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

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During the course of twenty-one censuses over the life of the American Republic, Congress has employed no fewer than four separate methods of apportioning Representatives among the several States. It did so until 1991 without even a suggestion, much less a constitutionally based challenge, that it is bound by the very general language of Article I, Section 2, Clause 3 to employ a specific methodological approach to apportionment—one which no Congress had ever employed and which fails to achieve principles of equity that Congress specifically took into account in 1941 in embracing the equal proportions method of apportionment. Against this formidable background of uninterrupted history, appellees strive to defend the district court's unprecedented holding that the Act of Congress that has apportioned Representatives among the States since 1941 is unconstitutional. That effort should fail.

This case has evoked much discussion of the rich history of apportionments by Congress, the mathematical

properties of various apportionment methods, the complex formulae by which those methods may be expressed, and competing views about the appropriate measures of equity in representation. In the end, however, the judgment below may be reversed on far simpler grounds. We have explained in our opening brief (at 10-13, 28-29)—and appellees do not dispute—that the method of equal proportions unquestionably apportions Representatives among the States "according to their respective Numbers" (*i.e.*, respective populations). Indeed, under that method (and the others Congress considered), each State's priorities are determined by a formula in which the numerator *is* the State's population, and no State can receive a greater number of Representatives than another State that has a greater population. Nothing more is required by Article I, Section 2, Clause 3.

Appellees' efforts to avoid this dispositive point are wholly without merit. Appellees' position runs aground on (A) the political question doctrine, which bars a court from second-guessing Congress's choice from among apportionment methods that are rationally tied to the States' populations; (B) the text of the Constitution and the history of apportionment since 1792, which confirm Congress's discretion and the constitutionality of the equal proportions method; and (C) principles of representation derived from the very reapportionment decisions upon which appellees rely.

On February 20, 1992, the three-judge district court in the suit brought by the Commonwealth of Massachusetts challenging use of the equal proportions method for the 1992 apportionment sustained the constitutionality of 2 U.S.C. 2a, thereby rejecting Massachusetts' contention that the major fractions (Webster) method is constitutionally compelled. *Massachusetts* v. *Mosbacher*, No. 91-11234 (D. Mass. Feb. 20, 1992), slip op. 28-59.[1] This Court likewise should sustain 2 U.S.C. 2a.

[1] The district court in the *Massachusetts* case held, however, that the Census Bureau erred in counting federal military and civilian personnel stationed overseas. Slip op. 59-88. (If those personnel are excluded, Massachusetts would be entitled to an additional Representative and the State of Washington would lose a Representative. *Id.* at 88 n.33.) In an accompanying order, the court directed the Executive Branch defendants to submit to the Clerk of the House, by March 31, 1992, a statement showing the number of Representatives to which each State would be entitled without inclusion of the overseas personnel, and directed the Clerk to send new certificates of entitlement to the States by April 10, 1992. However, those obligations of the federal defendants are contingent upon Massachusetts' submission to the district court of a redistricting plan for eleven Representatives by March 30, 1992. We are currently considering appealing this ruling.

A. As the Court pointed out in *Baker* v. *Carr*, 369 U.S. 186, 210, 217 (1962), the political question doctrine derives from "the relationship between the judiciary and the coordinate Branches of the Federal Government," and is "essentially a function of the separation of powers." This case goes to the very core of those concerns, because appellees challenge an Act of Congress that determines the composition of Congress itself, as well as the Electoral College. It therefore is not surprising that, contrary to appellees' contention (Br. 17-26), this case implicates the *Baker* v. *Carr* factors that signal the presence of a political question. Gov't Br. 24-34.

1. a. Appellees concede (Br. 17) that "the apportionment of seats within the House of Representatives is committed to Congress under Article I, section 2, clause 3" (see *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842)), but they do not regard Clause 3 as a "textually demonstrable constitutional commitment of the issue" within the meaning of *Baker* v. *Carr*, 369 U.S. at 217. Citing *INS* v. *Chadha*, 462 U.S. 919, 940-941 (1983), appellees argue (Br. 17) that the fact "[t]hat Congress is allocated power over a particular subject matter nonetheless has never been viewed as automatically insulating its exercise of such power from judicial review." Appellees overlook the critical distinction between *Chadha* and this case. *Chadha* involved the exercise by Congress of one of its enumerated powers under Article I, Section 8 to "alter[] the legal rights, duties or relations of persons * * * *outside* the Legislative Branch." 462

U.S. at 952 (emphasis added). By contrast, the law appellees challenge implements Article I, Section 2 and addresses the composition of the Legislative Branch itself. Nothing in *Chadha*, *Baker* v. *Carr*, or the other cases appellees cite supports their contention that the courts may entertain suits brought by individuals challenging Congress's resolution of that issue by selecting from among various apportionment methods that are tied to state populations.

The constitutional text in fact refutes any such contention. It provides for apportionment of Representatives among the States, with no reference to individual rights, and it concerns the political relationship between the States and the National Government. Compare *Coleman* v. *Miller*, 307 U.S. 433, 447-456 (1939) (whether States have ratified constitutional amendment proposed by Congress presents political question for Congress to resolve); *id.* at 456-460 (Black, J., concurring) (same); cf. *Chadha*, 462 U.S. at 955-956 n.21 (distinguishing Congress's submission of constitutional amendments from measures requiring presentment to President under Art. I, § 7, Cls. 2, 3).[2] Accordingly, appellees' portrayal (Br. 24-25 & n.23) of this case as nothing more than a variant of familiar "one person, one vote" litigation involving apportionments by state legislatures ignores the fact that appellees challenge an Act of *Congress*, and that the relevant constitutional text addresses a matter that is distinctly "political" in the relevant constitutional sense.

b. What is more, appellees make no effort to refute our submission (Gov't Br. 26-27) that closely related provisions of the Constitution that also determine the composition of the House of Representatives confirm the political nature of the question. First, Clause 3 commits

[2] Contrary to appellees' assertion (Br. 31 & n.28), there is no inconsistency between our position that Clause 3 apportions Representatives to the States themselves and our argument below that Montana lacks standing. The States are represented in Congress (see Gov't Br. 45 n.40), and it is in that forum that they must present any objections to an apportionment of Representatives. See also *Massachusetts* v. *Mellon*, 262 U.S. 447, 480-485 (1923).

the size of the House entirely to Congress's discretion, subject only to the minimum of one Representative for every State and the maximum of one for every 30,000 persons. The natural inference is that Clause 3 likewise commits to Congress's discretion the apportionment of whatever number of Representatives it chooses, so long as it is tied to state populations. Second, Clause 3 further provides that the decennial census shall be made "in such Manner as [the Congress] shall by law direct." Census data may profoundly affect the number of Representatives a State will receive. Because the text nevertheless commits the conduct of the census to Congress's discretion (Gov't Br. 27 & n.22), it would be illogical for the same Clause to require that Congress's choice of a particular apportionment method that is based on state populations ascertained by the census must be subjected to the sort of strict judicial scrutiny that appellees propose (Br. 44-45). Third, Clause 1 of Article I, Section 5 provides that each House shall judge the election of its Members, which gives the House unreviewable authority over the seating of Representatives from the States to which they are apportioned. Gov't Br. 27-28 & n.23. Given this foreclosure of any role for the courts at the conclusion of the process of constituting the House of Representatives, the Framers could not have intended to permit the courts to intrude deeply into the initial (apportionment) stage of that process.

2. Appellees' efforts to dismiss the remaining *Baker* v. *Carr* factors are equally unpersuasive. For example, appellees contend (Br. 21) that their apportionment challenge is justiciable because there is "no dispute" about which measures of equity are best served by the various apportionment methods considered by Congress in 1929 and 1941, and therefore no question "so exotic as to defy a court's competence to resolve." Appellees miss the point. Clause 3 furnishes a court with no guidance as to *which* of the possible measures of equity should be preferred. For this reason, selection of the appropriate measure of equity—and therefore of the apportionment method that

best comports with that measure—requires an "initial policy determination" that is necessarily committed to "nonjudicial discretion." 369 U.S. at 217;[3] compare *United States* v. *Sprague*, 282 U.S. 716, 730-732 (1931) (Article V affords Congress unreviewable discretion to choose between methods for proposing and for ratifying constitutional amendments).[4]

In a similar vein, appellees contend that a court may strike down Congress's chosen method of apportionment "without expressing lack of the respect due coordinate branches of government." Br. 23-24 (quoting 369 U.S. at 217). Appellees rely on the observation in *United States* v. *Munoz-Flores*, 495 U.S. 385, 390 (1990), that although a judicial ruling that Congress passed an unconstitutional law might in a sense be said to entail a lack of respect, to find a political question on that basis alone would render every challenge to a congressional enactment im-

[3] Each of the measures of equity, in its own fashion, relates to the population of the respective States. Those differing measures are triggered by the fact, which is inescapable under the Constitution, that sparsely populated States (which would otherwise not be entitled to a full Representative) will automatically be overrepresented under any method and that each State must receive a whole number of Representatives. In contrast, the intrastate districting cases, discussed at pages 14-18, *infra*, not only involved a different Clause of Article I, Section 2, but also involved situations where "one person, one vote" principles could be vindicated without doing violence to any policy choices embodied in the Constitution or congressional enactments.

[4] Appellees criticize our reliance (Gov't Br. 30) on *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), asserting (Br. 22 n.22) that *Japan Whaling* "explicitly reaffirmed the role of courts in construing constitutional and statutory provisions." But as the passage they quote from *Japan Whaling* makes clear, the Court there spoke only of construing treaties, executive agreements, and statutes, not *constitutional* provisions that prescribe the political responsibilities of a coordinate Branch. 478 U.S. at 230. In fact, the Court reiterated in *Japan Whaling* that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed to the halls of Congress or the confines of the Executive Branch." *Ibid.*

permissible. Appellees once again ignore the critical distinguishing features of this case. *Munoz-Flores*, like *Chadha*, involved a law passed pursuant to Congress's enumerated powers to regulate matters outside the Legislative Branch; this case, by contrast, involves a law prescribing the composition of the Legislative Branch itself and the resulting political relationship between that Branch and the States. Judicial second-guessing on a matter so central to the political character of a coordinate Branch clearly would reflect a "lack of respect" within the meaning of the political question doctrine, and would, at the same time, be far removed from the ordinary function of judicial review.

Furthermore, contrary to appellees' contention (Br. 25-26), this case *does* present "an unusual need for unquestioning adherence to a political decision already made" and the potentiality for embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. The need to ensure prompt redistricting by the States weighs heavily against intervention by the courts after the President has transmitted the requisite statement to Congress. If corrections must thereafter be made, the proper forum is Congress, where all the States are represented and a dispositive resolution may be promptly enacted, rather than potential lawsuits in the fifty States, where all the States cannot be joined.[5]

[5] The prospect of such an unwieldy regime of judicial review would produce a prolonged period of uncertainty after each census; undermine the accountability of Congress to the States and the people for resolution of an issue of paramount political importance; and create the appearance if not the reality of thrusting the federal courts into the political process. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 407-408 (1989).

The district court in the *Massachusetts* case rejected the proposition that review of the 1992 apportionment is altogether barred by the political question doctrine (slip op. 21-28)—while noting our more limited submission in this Court (*id.* at 22)—and disparaged the doctrine as an "avoidance technique" (*ibid.*). Moreover, in identifying judicially discoverable and manageable standards—and in otherwise finding the *Baker* v. *Carr* factors inapplicable—the *Massachusetts* court relied on the "one person, one vote" principle that

3. Finally, appellees fault us for not arguing that *all* matters pertaining to apportionment among the States are nonjusticiable. Br. 18-19. Their complaint is as odd as it is unavailing. We assume that a court may appropriately review an apportionment law for the limited purpose of determining whether it is plainly contrary to an explicit textual limitation on Congress's power, such as the requirement that each State receive at least one Representative. Gov't Br. 28. However, because Clause 3 commits apportionment to Congress subject to certain explicit limitations, it does no violence to separation-of-powers principles for a court to ensure that Congress has acted within those outer limitations—and thereby within the scope of the constitutional commitment. See *Baker* v. *Carr*, 369 U.S. at 216-217; compare *Powell* v. *McCormack*, 395 U.S. 486, 520-521 & n.42 (1969).

By the same token, the presence of a political question does not invariably require dismissal of the entire case. A particular *issue* may be nonjusticiable in the sense that a court should defer to and adopt the resolution of it by a coordinate Branch, while leaving the court free to decide other issues and the overall case. *Baker* v. *Carr*, 369 U.S. at 212-213; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380-381 (1948).[6]

Wesberry v. *Sanders*, 376 U.S. 1 (1964), drew from *Clause 1* of Article I, Section 2 in the intrastate apportionment setting (slip op. 25-27), thereby straying from the commitment of interstate apportionment to Congress in *Clause 3*.

[6] Appellees do not answer our contention (Gov't Br. 31-32) that the practical and jurisdictional difficulties in affording relief in a case such as this further cut against judicial involvement. They simply assert (Br. 47-50) that the district court in fact *did* grant effective relief by enjoining appellants from effecting apportionment under 2 U.S.C. 2a. Br. 47 (quoting J.S. App. 19a). As we have explained (Gov't Br. 32-33 n.27), however, that order has no effect on the 1991 apportionment, because appellants have already completed their duties under 2 U.S.C. 2a, and it is the statement transmitted by the President to Congress that determines the States' entitlements.

B. Our conclusion as to the constitutionality of Congress's specific choice of apportionment method—evident from the text of the Constitution and illuminated by the political question doctrine—is confirmed by history. From the outset, Congress has consistently acted on the premise that it may allocate Representatives in the manner that it finds most appropriate, so long as it comports with the general standard that apportionment be according to the "respective Numbers" of the States. In light of this historical practice and the extensive legislative record, it was manifestly reasonable for Congress in 1941 to settle upon the method of equal proportions, which resolves the problem of fractional remainders in a manner that minimizes the relative difference between any two States with respect to both persons per Representative (average congressional district size) and Representatives per person (each person's share of a Representative). See Gov't Br. 4-15, 34-43, 46-48; *Massachusetts* v. *Mosbacher*, slip op. 32-42, 53-59.

1. Certainly nothing in the history of the Constitution or the debates preceding its ratification forecloses the approach Congress has followed, including its rejection of harmonic means and adoption of equal proportions. In fact, as we have explained (Gov't Br. 34 & n.28), the few statements on the subject in the records of the Constitutional Convention suggest an expectation that fractional remainders would be disregarded. Those comments belie appellees' inspiration that the Constitution not only requires that fractions be taken into account, but requires that it be done in a particular way—by use of the complex formula for the method of harmonic means.[7] An

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[7] Appellees deny (Br. 29 n.27) that our citations to the constitutional debates undermine their position, contending that the references to "fractions" either concerned the counting of three-fifths of slaves (citing 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 559-562 (1966)) or arose in a discussion of the apportionment of taxes until the first census was taken (citing *id.* at 600-603; 2 *id.* at 357-358). This contention is disingenuous. Although Nathaniel Gorham referred to the "number of blacks & whites" in the first passage upon which we rely, his statement that "[f]ractions

observation by the district court in the *Massachusetts* case furnishes an apt rejoinder to this submission (slip op. 55): "If, as Justice Holmes reminded us, '[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,' *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), we find it difficult to believe that Article I, Section 2 enacted a particular mathematical formula to the exclusion of other approaches for obtaining equality 'as nearly as is practicable,' *Wesberry* v. *Sanders*, 376 U.S. at 78." See also slip op. 59.

2. Furthermore, if appellees are correct that Clause 3 of Article 1, Section 2 requires Congress to apportion Representatives so as to minimize absolute differences in the population of congressional districts (persons per Representative), then "Congress first went astray in 1792." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323 (1985). For in that year and in every succeeding decade, Congress has failed to adopt the harmonic means method.

From 1792 through 1832, Congress disregarded all fractional remainders by using the greatest divisors

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could not be observed" clearly referred to fractions of the ratio of one Representative for every 40,000 inhabitants, which was the proposal under consideration. 1 *id.* at 559. Similarly, although the context of the second and third statements upon which we rely was a debate on the apportionment of direct taxes, the principle of apportionment was the same for Representatives, and the statements of Oliver Ellsworth that we quote (Gov't Br. 34 n.28) specifically referred to fractions of the population ratios used to apportion Representatives.

Appellees likewise gain nothing from their general discussion (Br. 2-9, 28-29) of the Great Compromise, the Convention debates regarding representation in the House on the basis of population, and the requirement of a periodic census and reapportionment. None of that discussion suggests that Congress lacks discretion on the subsidiary question, at issue here, of which of several methods—*all* of which allocate Representatives in proportion to state populations—should be implemented. To the contrary, the very generality of the debates strongly supports the proposition that the Framers intended to leave such fine-tuning to Congress.

(Jefferson) method. Gov't Br. 5.[8] Congress then used the major fractions (Webster) method for the 1842 apportionment, and switched in 1850 to the Hamilton-Vinton method. The latter method was mandated by statute at the time the requirement that Representatives be apportioned among the States "according to their respective Numbers" was reiterated in Section 2 of the Fourteenth Amendment. Gov't Br. 6-7, 37-39. As we have explained, Congress's incorporation of that language is most appropriately viewed as a ratification of the flexibility it had afforded Congress over the preceding decades. See Gov't Br. 39 (citing *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 (1991), and *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-382 (1982)).[9]

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[8] Because Congress disregarded all fractions in 1792 and did not adopt the method that minimized absolute differences in persons per Representative, appellees' discussion (Br. 9-13, 29-30) of the debates on the apportionment law of 1792 does not support their argument that the latter method is constitutionally compelled. Moreover, the general references to "equality" in the debates (Br. 11 nn. 10 & 11) merely reflect the broad principle in Clause 3 that Representatives are to be allocated in proportion to state populations; they shed no light on the issue here.

Appellees misleadingly cite the remarks of Rep. Niles as reflecting a "concern for equality, *'as nearly as may be,'* in the numbers of persons in each district." Br. 30 (quoting 3 Annals of Cong. 246 (1791)). While Rep. Niles did use the italicized phrase, he did not mention "districts"; rather, he referred to the total population of Delaware and the size of its fractional remainder under alternative apportionment ratios. Appellees also err in suggesting that Secretary of State Jefferson objected to the vetoed apportionment bill only because the fractions for which it appeared to assign Representatives were less than the minimum ratio of 30,000 inhabitants prescribed in the Constitution. See Br. 12 n.17, 30 (citing H.R. Doc. No. 234, 22d Cong., 1st Sess. 6 (1832)). In fact, Jefferson expressed the view that all fractions remaining after use of a specified divisor must be disregarded. *Id.* at 3.

[9] Appellees try to avoid the ratification by observing that in *Mobil Oil* and *Merrill Lynch*, the "contemporary legal context" was created by prior court decisions that Congress was presumed to have incorporated into a subsequent enactment, while here that context was created by the actions of Congress itself. Br. 34-35 n.30. This dis-

And in particular, it refutes appellees' submission that the harmonic means method is constitutionally *compelled*, since that method had never been used. Compare *Richardson* v. *Ramirez*, 418 U.S. 24 (1974).[10]

3.a. Not only has Congress *never* used the harmonic means method that appellees insist is constitutionally compelled; for the six apportionments from 1941 through 1991, it has mandated use of the equal proportions method. Although appellees try to brush that practice aside with the observation that "historical patterns [alone] cannot justify contemporary violations of constitutional guarantees," Br. 35 n.30 (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)), this longstanding construction of the Constitution is entitled to great weight, since it concerns "constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny" by Congress. *Smiley* v. *Holm*, 295 U.S. 355, 369 (1932); Gov't Br. 43.

b. Appellees also try to impeach the equal proportions method by asserting (Br. 43 n.37) that it was chosen over major fractions in 1941 solely for "political expediency," because it prevented the shift of a Representative from Arkansas (which voted Democratic at the time) to Michigan (which voted Republican). See also Mass. Amicus Br. 37-38. Appellees are wrong.

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tinction, however, cuts in favor of, not against, the ratification argument, because Congress reasonably may be presumed to be *more* aware of (and to more readily approve) its own prior decisions than it is those of the courts. See also Gov't Br. 39 n.32 (discussing legislative history of Fourteenth Amendment showing congressional awareness of existing apportionment statute).

[10] Appellees try to explain away this fundamental defect in their position on the remarkable ground that "enactment of the Fourteenth Amendment preceded *Wesberry* and other landmark reapportionment decisions by nearly 100 years." Br. 35 n.30. Needless to say, *Wesberry* and the other decisions, which concerned intrastate apportionments by state legislatures, did not alter the meaning or congressional discretion embodied in the text of the Fourteenth Amendment (and Clause 3 of Article 1, Section 2) that governs the quite different subject of apportionment of Representatives by Congress among the States.

The political controversy principally concerned adoption of the equal proportions method for use in 1941, not in subsequent years, at issue here. See, *e.g.*, 87 Cong. Rec. 8053-8054, 8057 (1941) (Sen. Vandenberg of Michigan) (expressing willingness to accept equal proportions method for the future); S. Rep. No. 573, 77th Cong., 1st Sess. Pt. 2, at 2 (1941) (minority views) (resting objection to bill only on provision for use of equal proportions method in 1941); 87 Cong. Rec. 8083-8088 (1941) (rejecting amendment offered by Sen. Brown of Michigan to delete that provision). The legislative history in fact reflects a thorough awareness of various studies concluding that the equal proportions method is most equitable—including the 1929 report by the committee of the National Academy of Sciences (NAS) (see Gov't Br. 10-13, 41); the 1921 report by the advisory committee to the Director of the Census Bureau (see 67 Cong. Rec. 7078-7080 (1926)); testimony at the hearings conducted by the House Committee; reports by the Census Bureau; a survey by Professor Edward Huntington of Harvard, *Methods of Apportionment in Congress*, S. Doc. No. 304, 76th Cong., 3d Sess. (1940); the 1941 Brookings Institution study, R. Schmeckebier, *Congressional Apportionment*; and a law review article by Professor Zechariah Chafee, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015 (1929).[11] Against this background, the House Report found "little doubt the method of equal proportions is considerably favored over the method of major fractions" among the experts, and it expressed the opinion of the majority of the House Committee that the equal

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[11] See H.R. Rep. No. 30, 77th Cong., 1st Sess. 2 (1941); 87 Cong. Rec. 1072 (1941) (Rep. Gossett); *id.* at 1073-1074 (Rep. Michener); *id.* at 1075 (Reps. Cox, Michener); *id.* at 1076 (Rep. Sabath); *ibid.* (Rep. Curtis); *id.* at 1077, 1082 (Rep. Terry); *id.* at 1083-1084 (Rep. Allen); *id.* at 1087 (Rep. O'Brien); *id.* at 1088 (Rep. Gathings); *id.* at 1124 (Rep. Murdock); *id.* at 1125 (Rep. Anderson); *id.* at 1128 (Rep. Mills); *id.* at 8051-8052 (Sen. Caraway); *id.* at 8054-8056, 8058-8059, 8079, 8083-8088 (Sen. Burton); *id.* at 8077-8079, 8080 (Sen. Brown); *id.* at 8081-8082 (Sen. Spencer).

proportions method "is the better and more equitable method." H.R. Rep. No. 30, *supra*, at 2.

4. To overcome this overwhelming historical precedent and legislative record in favor of Congress's discretion to select the equal proportions method—and against their argument that the harmonic means method is constitutionally compelled—appellees rely (Br. 30-34) solely on *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). That case did not, however, announce a radical departure from the settled understanding of Congress's power to implement Article I, Section 2, Clause 3 and Section 2 of the Fourteenth Amendment. The Court did not even mention the point.

In *Wesberry*, the Court held that a state legislature must seek to achieve the standard of "one person, one vote" by drawing congressional districts within the State that, as nearly as practicable, contain equal numbers of people. 376 U.S. at 7-8; accord *Karcher* v. *Daggett*, 462 U.S. 725, 730-731 (1983). The Court did not address the antecedent question of how many Representatives Congress should apportion to the State (and therefore how many congressional districts the State should have), and the Court accordingly did not mention the apportionment methodology in 2 U.S.C. 2a, much less cast any doubt on its continuing validity.

Furthermore, *Wesberry* rested on *Clause 1* of Article I, Section 2, which provides that Representatives shall be chosen "by the People of the several States." See 376 U.S. at 7-8; *Reynolds* v. *Sims*, 377 U.S. 533, 559, 560 (1964). That Clause had previously been construed to afford a personal right to vote in federal elections. Gov't Br. 44. *Wesberry* built on those prior decisions to hold that a State may not dilute the right to vote by drawing congressional districts that have substantially unequal populations. 376 U.S. at 17-18. That holding has no application in this case, which involves neither a state legislature's regulation of congressional elections nor its drawing of congressional districts within the State, but rather *Congress's* apportionment of Representatives

among the States. That subject is governed by *Clause 3* of Article I, Section 2. Unlike Clause 1, Clause 3 does not mention the "People" of the several States—and therefore does not suggest that it confers on the "People" of a State any personal rights with respect to the apportionment of Representatives by Congress. Instead, Clause 3 provides for apportionment of Representatives to the States themselves, based on their aggregate populations. There accordingly is no textual basis for the district court's holding (and appellees' contention) that the Constitution requires Congress to apportion Representatives among the States so as to minimize the absolute difference between the average size of *congressional districts* within the States.

Appellees' only response is to plead (Br. 31-32, 34) that Clause 1 and Clause 3 of Article I, Section 2 should be read together, so that the apportionment method they believe best comports with the "one person, one vote" principle that *Wesberry* extracted from Clause 1 can be imported into Clause 3 as well. See also Mass. Amicus Br. 14-16. That argument tears constitutional analysis from constitutional text: it simply ignores the fact that Clause 1 refers to the "People of the several States"—and thus, under *Wesberry*, requires equality of representation among the people (and the congressional districts into which they are placed) within each of the separate States—while Clause 3 conspicuously omits any comparable language, and instead addresses the distinct relationship between the House of Representatives and the States themselves.

Nor is there any practical justification for the Court, at this stage of the Nation's history, to embark on the unprecedented path of subjecting Acts of Congress apportioning Representatives among the States to the sort of scrutiny to which decisions such as *Wesberry* and *Reynolds* v. *Sims* have subjected a state legislature's reapportionment of congressional districts or state legislative districts within a State. Those cases were prompted by

gross malapportionments that had resulted from intentional decisions to favor certain geographic areas or the failure by state legislatures to redraw district lines in response to dramatic population changes. See, *e.g.*, *Wesberry*, 376 U.S. at 2; *Reynolds* v. *Sims*, 377 U.S. at 545-551. Those circumstances directly implicated concerns about "rotten boroughs" within the States that had been voiced by the Framers. See *Wesberry*, 376 U.S. at 14-15.

No remotely parallel circumstances are present here with respect to the apportionment of Representatives among the States. There can be no serious contention that Congress has failed to make "an honest and good faith effort" (*Reynolds* v. *Sims*, 377 U.S. at 577) to provide for that apportionment in accordance with principles of equity among the States and their inhabitants. To the contrary, as the three-judge court in the *Massachusetts* case observed, "[t]he Constitutional command of decennial reapportionment coupled with Congress's own institutional concerns has resulted in continuous, thoughtful, extensive and intensive examination of the problem by Congress throughout the past two centuries," and "it is apparent that Congress has carefully addressed itself to finding a method which implements the basic principle of assuring as nearly as practicable equal representation in the House of Representatives for equal numbers of people." Slip op. 43. Proper respect for Congress, and the dictates of the political question doctrine, compel rejection of efforts by the courts to "improve" on that process.

C. Even if we assume, arguendo, that the "one person, one vote" principle of *Wesberry* is applicable in this setting, appellees' challenge to the equal proportions method still fails. That was the holding by the *Massachusetts* court, which, applying a standard of review drawn from *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), concluded that the equal proportions method is "plainly adapted to the end of approximating as close as

practicable the goal of 'one person, one vote,'" and that "nothing in the Constitution prohibits it." Slip op. 51, 53, 54-56.[12] In so ruling, the court rejected the "wholesale assimilation" (urged by appellees here) of the rigid standards of *Karcher* v. *Daggett*, correctly finding them not "appropriate for the task" of evaluating congressional apportionment judgments. *Id.* at 50. In its view, the stringent standards imposed on a state legislature under *Karcher* reflect the status of the State as "a delegatee of the federal governmental organization." *Id.* at 48. By contrast, the court reasoned, greater deference must be given to the "distinctive qualities" of the considered judgment by a "separate and coequal branch" when it apportions Representatives among the States. *Id.* at 50.[13]

Furthermore, application in this setting of the rigid *Karcher* standards makes no practical sense. Where ap-

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[12] The *Massachusetts* court rejected both the plaintiffs' contention that 2 U.S.C. 2a must be subjected to strict scrutiny and the government's contention that judicial review is confined to determining whether Congress's judgment offends an express textual limitation in the Constitution (such as the requirement that the apportionment be tied to state populations). The court rejected the latter standard because it would exclude from consideration "the 'one person, one vote' principle derived in *Wesberry* from the perceived intent which animated the words 'by the People of the several States' in Article I, Section 2, Clause 1" (slip op. 52-53)—a principle that it also found to be "implicit in the letter and [to] animate[] the spirit of the Constitutional requirements" governing Congress's apportionment of Representatives among the States. Slip op. 53.

[13] This distinction finds a rough parallel in the more deferential standard the *Massachusetts* court noted in this Court's decisions reviewing a State's apportionment of its own legislature (see *Gaffney* v. *Cummings*, 412 U.S. 735, 741-742 (1973)), since "the states are entitled to some latitude in defining the way in which they accommodate the various interests which come into play when they organize their own governmental structures." Slip op. 48. Congress's apportionment of Representatives among the States also more closely resembles apportionment of a state legislature than the drawing of congressional districts within a State for the additional reason that the entire 435 seats are at stake and the political boundaries of the States must be respected. Compare *Mahan* v. *Howell*, 410 U.S. 315, 321-322 (1973).

portionment of congressional districts within a State is concerned, it is possible to achieve virtually absolute equality in both persons per Representative (congressional district size) and Representatives per person (each person's share of a Representative). By contrast, in an apportionment of Representatives among the States, there inevitably will be differences of several hundred thousand in the number of persons per Representative between the States under *any* apportionment method Congress might choose. 2 J.A. 69-70. These differences are inherent in the exercise by Congress of its plenary power to implement Clause 3 and Section 2 of the Fourteenth Amendment; as a result, the fact that the magnitude of those differences might vary somewhat depending upon the particular apportionment formula Congress actually selects cannot alone be thought to *violate* those same constitutional provisions. Otherwise, Congress would be stripped of the flexibility and independent judgment it historically has exercised to accomplish the complex task of fashioning an apportionment that, in its view, best balances from a number of perspectives the equities of both the States and their people. Accordingly, neither *Karcher*'s analytical framework nor its unyielding drive toward perfect equality in congressional-district size can appropriately (or effectively) be transplanted to this quite distinct setting.

Finally, as we explained in our opening brief (at 46), equality of representation—and the principle of one person, one vote—may be expressed either in terms of persons per Representative or each person's share of a Representative; indeed, "there is no inherent reason for the choice of one rather than the other." Chafee, 42 Harv. L. Rev. at 1031. As amicus Massachusetts points out (Br. 20), when drawing congressional districts *within* a State, the requirement of *Wesberry* and *Karcher*—that the districts be equal in population as nearly as practicable—serves to minimize absolute differences in *both* measures.

By contrast, in apportioning Representatives among the States, no single method minimizes absolute differences in both measures. Rather, the harmonic means

method urged by Montana minimizes absolute differences in the number of persons per Representative, while the major fractions method urged by Massachusetts minimizes absolute differences in shares of a Representative. Accordingly, to adopt one of those methods would disserve the goal of the other. However, the equal proportions method has the considerable virtue of minimizing *relative* differences in *both* persons per Representative and shares of a Representative. Gov't Br. 41. As the district court in *Massachusetts* observed, "relative measurement is a mathematically acceptable means by which to make equity comparisons"; "[certainly] nothing in the Constitution" or the "case law" prohibits it, and in the apportionment decisions of this Court cited by the district court in the instant case (J.S. App. 14a), the relative (percentage) difference from ideal district size was a "critical element of evaluation." Slip op. 56.

Furthermore, the 1948 NAS report established that although harmonic means is superior to equal proportions (and the other three methods) in minimizing absolute differences between persons per Representative,[14] it is inferior to equal proportions in minimizing absolute differences in shares of a Representative. Conversely, although major fractions is superior to equal proportions (and the other three methods) in minimizing absolute differences in shares of a Representative, it is inferior to equal proportions in minimizing absolute differences in persons per Representative. Gov't Br. 46-47. Thus, in addition to minimizing relative differences, equal proportions occupies a middle ground between harmonic

[14] As we have pointed out (Gov't Br. 47-48 & n.42), appellees in any event greatly exaggerate the advantages of the harmonic means method in this case even under the single standard of absolute equity they endorse. Indeed, the 8.7% difference in the range of congressional district sizes under the two methods would not, in our view, rise to the level necessary to trigger further scrutiny under *Wesberry* principles in the special context of apportionment of Representatives among all the States. Cf. *Brown* v. *Thompson*, 462 U.S. 835, 842 (1983) (10% threshold to trigger scrutiny of statewide apportionment of state legislative districts).

means and major fractions with respect to *absolute* measures of equality.[15] An apportionment method that has these qualities—and that has consistently produced an equitable apportionment over the past half century—plainly does not violate the general standards of equity in Article I, Section 2 and the Fourteenth Amendment.

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case should be remanded with directions to enter judgment for the appellants.

Respectfully submitted.

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Solicitor General

FEBRUARY 1992

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[15] The equal proportions method also minimizes the variance of the 435 congressional districts from the nationwide average district size. See Gov't Br. 42. Appellees concede (Br. 40) that variance is a mathematically accepted measure of "dispersion of data around a particular point."

In addition to promoting the notions of individual equity embodied in the "one person, one vote" principle, the equal proportions method also allocates the contested Representative to a State (Washington) that has a higher fractional remainder than Montana. See Gov't Br. 29. Similarly, in the 1941 dispute concerning Arkansas and Michigan (see pages 12-13, *supra*), the equal proportions method allocated the contested Representative to Arkansas, which had the higher fractional remainder, while the major fractions method allocated it to Michigan, which had the lower remainder. See M. Balinski & H.P. Young, *Fair Representation* 58 (1982).

Amicus Massachusetts argues (Br. 33-36, 47-51) that, as compared with major fractions, the equal proportions method produces results that deviate too far from each State's "quota" and is biased in favor of smaller States. Those contentions were answered by the three Ernst Declarations filed by the government in the district court in the *Massachusetts* case (and lodged with the Clerk of this Court), and they were rejected by the district court in that case. Slip op. 57-58.

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